

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 10, 2005 Session

**KEVIN JOSEPH COSTLEY v. VICKI BROWN (COSTLEY) BENJAMIN**

**Appeal from the General Sessions Court for Wilson County  
No. 4481 Robert P. Hamilton, Judge**

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**No. M2004-00375-COA-R3-CV - Filed August 12, 2005**

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Following divorce, the mother was awarded primary custody of the parties' two young children. Five years later, she acquiesced to letting the older child, a son, live primarily with his father. The father then petitioned the trial court for primary custody of both children. The court named him the primary residential parent for the older child, but left the mother as the primary residential parent for the parties' younger child, a daughter. Less than a year later, the father filed another petition for modification of the parenting arrangement regarding the daughter, asking that primary residential placement be with him. This time, the trial court granted the petition, reasoning that the father would never relent in his efforts to obtain primary residential placement and that the parents' continuing struggle was detrimental to the child's well-being. We reverse the trial court because we do not believe that the father has demonstrated a proper ground for modification of the prior parenting arrangement and because the proof shows that the mother is more inclined than the father to encourage the child's relationship with the other parent.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court  
Reversed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR. JJ., joined.

Joe H. Thompson, Gallatin, Tennessee, for the appellant, Vicki Brown (Costley) Benjamin.

James H. Flood, Lebanon, Tennessee, for the appellee, Kevin Joseph Costley.

**OPINION**

**I. DIVORCE AND CUSTODY**

In 1994, Kevin Costley ("Father" or "Mr. Costley") filed a Complaint for Divorce in the General Sessions Court of Wilson County. Mr. Costley asked for custody of the parties' two

children: Brandon, who was born in 1986, and Kayla, who was born in 1992. His wife, Vicki Costley (“Mother” or “Ms. Benjamin”), answered and counter-claimed for divorce. She also asked for custody of the children. The parties ultimately stipulated that each of them had grounds for divorce from the other. On January 26, 1995, the trial court awarded divorce to both parties, pursuant to Tenn. Code Ann. § 36-4-129(b).

The court granted joint custody of the children to both parties, with primary residential custody to remain with Mother and child support to be paid by Father. A parenting plan that included a visitation schedule was made part of the court’s decree. *See* Tenn. Code Ann. § 36-4-401. Because the decree left some questions unsettled in regard to personal property and schooling for the children, Mother filed a motion to clarify, set aside, or amend the final decree.<sup>1</sup> An amended final decree was entered December 14, 1995. The new decree declared that Mother would exercise sole custody of the children and made specific provisions for transfer of the children at times of visitation, but left matters regarding residential scheduling and support otherwise unchanged.

Unfortunately, the court’s decree did not mark an end to the parties’ struggle over their children. The record includes a number of motions, petitions and orders evidencing the continuing disputes between the parties. Both parties remarried (Father twice), and the new spouses were drawn into the struggle as well. Extended family and friends were essentially forced to take sides. The police were called several times after arguments erupted between Father and Mother’s new husband. Eventually, the parties started using the police station as a neutral location to transfer Kayla for purposes of visitation.

As the struggle continued, it had a noticeable effect on the children, and they both went for psychological counseling. The only issues in this appeal concern the custody of the younger child, Kayla, but a brief account of the events leading up to the order appealed from is necessary for a full understanding of the court’s decision.

## **II. POST-DIVORCE PROCEEDINGS**

As Brandon Costley got older, he expressed the desire to live with his father, a desire Father encouraged. In February of 2000, after consultation with Brandon’s counselor, Mother agreed to allow Brandon to move in with Father and his new stepmother on a trial or temporary basis. Mother claimed that Father promised that if she would allow Brandon to live primarily with him, he would not continue to litigate custody and would not pursue custody of Kayla. However, on April 18, 2000, two months after Brandon moved into his father’s house, Father petitioned the court for a change to the existing parenting order as to both children.

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<sup>1</sup> Pending resolution of this motion, the court entered an agreed order in which the parties agreed to set aside the final decree. They also agreed to specific procedures for transfer of the children at the beginning and end of the father’s visitation. They also specifically agreed “to avoid any type of confrontations in front of the parties’ children.” The record reflects that the parties continued to have disputes over discovery, scheduling, and other matters during this time.

Father alleged that circumstances had changed since the last custody order in that: he had remarried and had a stable home; Brandon had been living with him for two months with Mother's agreement; Mother had been discussing Kayla's relationship with Father with Kayla; and Father's mother had retired and could keep the children after school instead of having a sitter keep them.<sup>2</sup>

Father's April 2000 petition to modify was not heard until January 2, 2002. In the interim between the filing of the petition and the hearing, Mother was restrained from removing Brandon from Father's custody except for visitation. There was an agreed order entered directing that Kayla be enrolled in school in Mt. Juliet pending the hearing on the petition, that Mother not take Brandon around Father's former wife, and that neither party pay child support to the other. Other matters were raised and determined during the pendency of Father's petition. In particular, by order entered February 7, 2001, clarifying issues regarding the current situation, the court designated Mother as primary residential parent for Kayla and Father as primary residential parent for Brandon. The order specifically stated that the parties would refrain from sending messages through the children. Visitation was continued on an alternate weekend basis so that each parent had both children every other weekend.

In February of 2001, the parties attempted mediation, but that was unsuccessful.<sup>3</sup> The mediator observed, "It is my perception that the parties will have new problems of their own creation, after any final order is done."

There were factual changes as well. After Brandon moved in with Father, his relationship with Mother deteriorated, and he became increasingly unwilling to visit her. After a disagreement, he refused to leave with Mother for weekend visitation after a ball game on March 8, 2001, and missed the next weekend and weekday visitations. Brandon called on March 14 stating that Mother would have to take them to court if she wanted to see him anymore.<sup>4</sup> By the hearing on the petition that is the subject of this appeal, Brandon still had not visited with his mother.

After Brandon's visitation stopped, Mother filed a motion to require Father to place Brandon back in counseling with the counselor he had been seeing prior to Brandon's move to Father's house, since Father had discontinued that counseling, which Mother alleged was contrary to the court's prior order. Father moved the court to order that Mother and Brandon attend counseling with a family

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<sup>2</sup>Mother responded that after school Kayla attended the same day care she had been attending since she was three; that Brandon went to a neighbor's house after school; and that she usually picked both children up by 6:00 p.m. She also objected to Father's mother keeping the children since the paternal grandmother spoke derogatorily about her in the presence of the children.

<sup>3</sup>The mediator reported that after one and a half hours he could not justify going further. "Each party seems to feel that the other only wants more control than either of them is willing to give. It was apparent to me that neither came into mediation with even the slightest expectation or hope that I would be able to help them resolve their differences."

<sup>4</sup>On March 28, 2001, Mother filed a motion asking that Father be held in contempt, with accompanying affidavit, regarding Brandon's visitation.

counselor recommended to Father, presumably a new counselor. On April 20, 2001, the trial court ordered Father to make immediate arrangements to place Brandon in counseling with a specific therapist, Dr. D'Imperio, in order to begin re-establishing visitation between Brandon and his Mother. The court directed that Dr. D'Imperio make a report to the court before the next hearing which was then set for May 3, 2001. The court suspended Mother's visitation with Brandon pending a hearing or agreement through counseling.

The petition for change of residential schedule came for hearing on May 3, 2001, but the parties agreed to continue the matter for a two-day trial to be held in the fall. In its order resulting from that May hearing, however, the court ordered that Mother continue to be the primary residential parent for Kayla and that Father continue to be the primary residential parent for Brandon. The court continued the existing visitation schedule of alternate weekends and one evening per week and set summer visitation, alternating two week periods of visitation for each parent with both children. The court also ordered that both parties participate in counseling with Brandon with Dr. D'Imperio to the extent requested by the therapist. The court also enjoined both parties from making derogatory remarks about the other in the presence of the children and from allowing others to do so.

Father's petition to modify the residential schedule of both children was finally heard on January 2, 2002. After the hearing, the court entered a final order that essentially ratified the status quo, naming Father the primary residential parent for Brandon and Mother the primary residential parent for Kayla. Visitation, or a residential schedule, was established in a parenting plan accompanying the order. The court gave the primary residential parent for each child authority to make decisions for that child regarding participation in sports. The court also specifically ordered Father to attend and complete a five-week anger management class and certify completion to the court within six months.<sup>5</sup>

The final order resulting from the hearing on Father's petition to modify custody of both children was not entered until August 23, 2002. During the interval between the hearing and entry of the order, Mother married Richard Benjamin, whom she had been dating for some time.

On June 13, 2003, Father filed another Petition for Change of Primary Residential Parent, and asked again that he be named primary residential parent for Kayla. Among other things, the petition alleged that Kayla's relationship with Mr. Benjamin was not good and that "the child has expressed her desire to live with her Father and is willing to talk to the Judge in chambers." Father

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<sup>5</sup>There is no proof regarding Father's compliance, but comments made during the hearing on the petition before us indicate Father did not comply with this directive. The court also ordered Father to reimburse Mother, within sixty days, for certain medical expenses incurred on behalf of the children. Mother filed a petition for contempt in December of 2002 alleging that Father had not paid the expenses and had not maintained insurance on the children as provided in the parenting plan. After a hearing on the petition, the court ordered Father to make the payments previously ordered and stated that failure to make those payments immediately would result in the issuance of an attachment for Father and his being incarcerated. The court also ordered Father to pay Mother for costs incurred due to his failure to notify her regarding medical insurance coverage and costs of the contempt proceedings.

also stated that he himself had remarried and that his new wife, Amy Costley, had a good relationship with both children.

The hearing on the new petition took place over three days in September and October of 2003. In addition to testimony by the parties and by both children, the court heard from Richard Benjamin, Amy Costley, and seven relatives, friends and acquaintances of the parties, as well as from two psychologists who had evaluated and/or treated the children.

The trial court granted Father's petition and made Father the primary residential parent for Kayla. The judge reasoned that if Kayla lived primarily with Father, she would probably lose contact with Mother, as Brandon had. On the other hand, if she were ordered to stay with Mother, Father would not relent in his attempt to obtain primary residential placement and Kayla would remain torn and conflicted. The trial court concluded, "so I think, under the circumstances, I think for Kayla, it's better to end the conflict."

At that point, Father's attorney asked if the court found there to have been a material change of circumstances. The judge responded that there was. "Just the change in the family relationship, no matter whose blame it would be, but those dynamics, that's a material change of circumstances in and of itself." The court's order of December 12, 2003, memorialized the decision to award primary residential placement to Father, and ordered Mother to pay child support for the two children. This appeal followed.

### **III. REQUIREMENTS FOR MODIFICATION OF PARENTING ARRANGEMENT**

Once a valid order of custody or residential parenting schedule has been entered, the party petitioning to change that order must prove both that a material change of circumstances has occurred and that a change of custody or residential schedule is in the child's best interest. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 575 (Tenn. 2002). Such determinations involve a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003); *Kendrick*, 90 S.W.3d at 570. Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a fresh determination of the best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002); *see also* Tenn. Code Ann. § 36-6-101(a)(2)(B) and (C).

In determining whether such a change of circumstances has occurred, the court should consider several factors that form a sound basis for that determination. *Blair*, 77 S.W.3d at 150.

Although there are no bright-line rules for determining when such a change has occurred, there are several relevant considerations: (1) whether the change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way.

*Cranston*, 106 S.W.3d at 644, citing *Kendrick*, 90 S.W.3d at 570, and *Blair*, 77 S.W.3d at 150.

In the case before us, there was great deal of testimony about events that occurred after the hearing on the earlier petition held January 2, 2002, but before the court's final order of August 23, 2002. These include Mother's marriage to Richard Benjamin and several specific incidents that were given as examples of the reasons Kayla did not like her stepfather.

Mother argues on appeal that none of these events can be considered a material change of circumstance such as would support a modification of the existing custody or parenting arrangement, because such a change must occur "after the entry of the order sought to be modified," and must not have been "known or reasonably anticipated when the order was entered," relying on the language of the Tennessee Supreme Court decisions discussed above.

We agree that circumstances occurring before the entry of the final order on Father's first petition to modify cannot constitute a material change of circumstances. They occurred prior to the order Father sought to modify in his second petition, which was the subject of the order on appeal herein. The clear language of *Cranston*, *Kendrick*, and *Blair* compel this conclusion. As the discussion in *Blair* of prior decisions indicates, the requirement that the change occur after the entry of the order sought to be modified is not new. *Blair*, 77 S.W.3d at 150.

There are several reasons for this requirement. A policy reason underlying the change of circumstances requirement is the importance to the child of stability with regard to parenting arrangements. "The general assembly finds the need for stability and consistency in children's lives." Tenn. Code Ann. § 36-6-401(a). *See also Blair*, 77 S.W.3d at 148-49 (emphasizing the child's interest in a stable and secure environment).

Additionally, it is well settled that a valid custody or residential placement schedule, once entered and implemented, is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 2000); *Solima v. Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).

The doctrine of *res judicata* bars a second suit between the same parties on the same cause of action with respect to all issues "which were or could have been litigated in the former suit." *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 495 (Tenn. 1995). Thus, facts that were known at the time of the entry of the former order cannot be litigated in a later proceeding, even if they were not litigated in the prior proceeding.

Consequently, an order on child custody or residential schedule cannot be modified in the absence of proof of a material change of circumstances, *i.e.*, a change of circumstances since the existing order that has altered the situation in a material way that affects the welfare of the child.

Despite the length of time that expired between the hearing on Father's first petition and entry of the final order, it is the date of the order that must control. *Long v. Long*, 488 S.W.2d 729, 731-732 (Tenn. Ct. App. 1972). In *Long* there was a three month interval between a divorce hearing and the entry of a final decree which awarded custody of the minor children to Mother. Father subsequently filed a petition for change of custody, alleging that Mother had engaged in inappropriate behavior between the hearing and the final decree. The trial court granted Father's petition. This court reversed, reasoning that

Since the Plaintiff had knowledge of all of the material facts, about which he now complains, prior to the entry of the divorce decree, but remained silent while the case was still within the bosom of the Court, he cannot now contend that this constitutes a change in circumstances since the entry of the decree.

*Long*, 488 S.W.2d at 732. See also *Dillow v. Dillow*, 575 S.W.2d 289, 291 (Tenn. Ct. App. 1978); *Safer v. Safer*, No. 01A-01-9601-CH-00018, 1996 WL 438869, at \* 2 (Tenn. Ct. App. Aug. 2, 1996) (Tenn. R. App. P. 11 perm. app. denied). Thus, a party who has knowledge of material facts or reasonably should have known of them before entry of a final order, but does not bring them to the attention of the court, cannot use those facts in a later modification proceeding to show a material change of circumstances.

As stated earlier, a modification determination involves a two-step analysis. If, and only if, a trial court finds that a material change in circumstances has occurred, it must then determine whether modification of the existing parenting arrangement is in the child's best interest. *Cranston*, 106 S.W.3d at 644. That determination requires consideration of a number of factors, including those listed in Tenn. Code Ann. § 36-6-106(a) (factors to consider in custody determination) and Tenn. Code Ann. § 36-6-404 (b)(factors to consider in establishing a residential schedule). *Id.*

With these principles in mind, we review the evidence produced in the hearing on the petition that is the subject of this appeal.

#### IV. THE HEARING

The hearing began with Mother 's counsel raising issues regarding Father's decision to keep Kayla with him that morning, after spending her regular midweek night at Father's house, as opposed to taking her to school or to Mother as required by the existing residential placement plan. The court was not required to decide those issues at the time, and none are part of this appeal.<sup>6</sup>

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<sup>6</sup>Father's actions are relevant only to the extent they implicate any influence on the child's testimony or are part of a pattern of conduct by Father.

Father began his case by calling eleven-year-old Kayla to the stand. She testified that she did not like her stepfather. Under questioning, she stated that she didn't like Mr. Benjamin from the moment she first saw him, but admitted that she wouldn't have liked anyone her mother married. She had anticipated there would be problems between Father and anyone Ms. Benjamin married.

Although Kayla had always generally disliked Mr. Benjamin, she pointed to two incidents as particular causes of her feelings. Both happened over a year before the petition at issue was filed, before Mr. and Mrs. Benjamin married, and before the order on Father's previous modification petition was entered. To the extent these incidents triggered a change in Kayla's attitude toward Mr. Benjamin, they cannot be considered a material change of circumstances because they occurred before the entry of the last order setting a residential schedule for Kayla. However, the testimony about the incidents and the reactions to them demonstrate the underlying problem in this case. Consequently, it is worth describing them.

Before Mother's marriage to Mr. Benjamin, Kayla and Mr. Benjamin disagreed over the television set. Although Mr. Benjamin and Mother had been watching a show, Kayla wanted to use the television to play Nintendo and seized the opportunity in a break in the viewing. When Mr. Benjamin asked her to change the channel back, she did not comply. Kayla stated Mr. Benjamin said he was going to take the game away and that in the course of the ensuing disagreement, Mr. Benjamin grabbed her arm, leaving a red mark. Mr. Benjamin testified he was trying to get the game from Kayla. Later, when Mr. Benjamin left that night, he drove off forgetting that the family dog was tied to his truck. The dog was dragged behind the truck and was seriously injured.<sup>7</sup>

Kayla told her father about the Nintendo incident, and he sent her to talk to an aunt, who told her she could file a police report. Kayla, who was then nine or ten years old, wanted to file a report and talked to the police, who later interviewed Mr. and Ms. Benjamin.<sup>8</sup> Sending the police to the Benjamin house became a pattern during this custody struggle.<sup>9</sup>

When the dog was injured, Kayla's father took her to see the dog at the veterinary hospital one time: the day after the accident when the dog was in its worst condition. She was understandably upset by this visit. According to Mr. Benjamin, acquaintances around town were told he had purposely dragged the dog, and Father continued to make reference to the incident.

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<sup>7</sup>Mr. Benjamin testified that when another driver signaled to him what was happening, he pulled over, untied the dog, and took him immediately to a veterinarian. All four of the animal's legs were broken, and Mr. Benjamin paid between \$1,200 and \$1,500 to have him treated. While the dog was healing, Mr. Benjamin would carry him upstairs and downstairs every day. The animal ultimately recovered and became very attached to Mr. Benjamin. Mr. Benjamin was very contrite about this accident, but Kayla continued to hold the incident against him.

<sup>8</sup>The record implies that nothing ever came of this investigation.

<sup>9</sup>For example, Ms. Costley testified about a time they thought Kayla tried to call them. When they were unable to get an answer at the Benjamin house, they sent the police to ascertain that Kayla was alright. Mother also testified about this night time visit by police.

Kayla also described several hostile incidents between Father and Mr. Benjamin, two of which occurred at a ballpark when one of the children was playing. These incidents both occurred before the filing of the August 23, 2002 order.

Mother, Mr. Benjamin, and Kayla participated together in a number of activities, including celebrations, birthday parties, and family vacations.<sup>10</sup> Kayla was asked about these occasions, and was shown photographs of them, and she generally referred to the experiences as “okay,” including a trip to Disney World. The photos showed Kayla smiling, apparently having fun, and seeming to enjoy herself. But when asked about these activities, Kayla downplayed any implication that they gave her any pleasure.

Kayla’s testimony led the trial judge to ask her if there was anything good about the stepfather, “any one teeny tiny thing that you could think of that you could say good about him, just one tiny thing?” Kayla shook her head from side to side and denied that Mr. Benjamin possessed any such qualities. She eventually conceded he could cook some dishes well.

Kayla testified that she wanted to live with her father, stepmother, and brother because she did not like Mr. Benjamin and did not want to be around him. In testimony given on a later day in the hearing, approximately a month after the first day, Kayla also admitted that she had told Mother that the only way the fighting and legal battles between her parents would stop was for Kayla to live with her father. She told the court that she wanted the fighting to end and that, in her opinion, it would not end as long as she lived primarily with Mother.

Father testified very briefly. He was asked why he wanted custody of Kayla, and he stated that she was resented by her stepfather, and was being mistreated, badgered, and made to feel guilty about her feelings towards Father. Asked how he knew all that, he said that Kayla told him. He also testified that his household could provide Kayla a better family environment and allow her to participate in more activities.

Amy Costley, Father’s new wife, also testified briefly. She stated that she and Kayla had developed a very close relationship. Mother’s attorney asked her about a letter she wrote a year or more earlier to Kayla that was critical of Mother for disciplining the child. The letter read in part, “Kayla, you’re a smart young lady with great faith in God, pray that he’ll get you freedom in the next few months. While your mama’s hurting you today she’s only helping you to get to your daddy for good in the long run. So remember, a little pain today will pay off.”<sup>11</sup> The letter concluded with this caution, “this letter should not have been opened by anyone but you, make sure it’s my handwriting on the envelope.”

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<sup>10</sup>The photographs of these activities included birthday parties, a pumpkin carving party, the Wilson County Fair, and vacation trips to Myrtle Beach, Disney World, Sea World, and Six Flags.

<sup>11</sup>Mother also testified that after the hearing on Father’s prior petition, when he left the courthouse he told Kayla, who was sitting in the hall, that although she would be seeing him less for a while, eventually he would be successful in having her live with him. Father denied making this statement.

When asked whether a message containing such negative implications against a parent was appropriate to send to a then nine-year old girl who was in the middle of a custody battle, Ms. Costley stated that under the circumstances it was. She also testified that she encouraged Kayla to get along with her mother and to understand that her mother needed the companionship of a spouse.

Brandon Costley, Kayla's brother, testified that he did not like Mr. Benjamin because of the incidents with the Nintendo and the dog (neither of which he witnessed) and because Mr. Benjamin had once spoken to him in what Brandon perceived as a threatening way. He stated that he did not want to visit his mother until "something happened" between her and her new husband (like them breaking up) or if he could see her without seeing him.

Mother testified at length. She stated that much of the time Kayla enjoyed normal home life and that she participated with her stepfather in such activities as drawing pictures, working on school projects, singing, watching television, and joking around. She claimed that at those times, Kayla seemed relaxed and happy, and even showed some affection towards Mr. Benjamin. However, as these court proceedings approached, Kayla became withdrawn and apprehensive and would not even meet her mother's or her stepfather's eyes. Mother testified that Kayla and Mr. Benjamin had made real progress toward building a relationship before Father's latest petition was filed, but that the stress of the impending custody battle, with Kayla expecting she would have to testify, had dampened that relationship.

Mother also testified that Kayla had not wanted her father to remarry, but that Mother had nonetheless encouraged her daughter to develop a positive relationship with Amy Costley. Mother agreed that Kayla's relationship with her stepmother was good; she appreciated the value to Kayla of another person to love her.

Mother testified that when Kayla was with Father and they ran into her maternal grandparents or other relatives or friends of Mother, Kayla did not greet them or acknowledge them in any way. Similarly, when she was with Mother and they ran into Father's relatives, Kayla tended to ignore them. But in those situations Mother had told Kayla that it was rude to ignore her relatives and insisted that Kayla go over and talk to them.

Richard Benjamin testified that he had been developing a very friendly relationship with Kayla until Father's petitions were filed. He stated that he leaves all matters of discipline to Mother and that he never even raises his voice to Kayla. Kayla confirmed that Mr. Benjamin had never spanked or touched her other than the one grabbing incident she had described. Mr. Benjamin also stated that he was 46 years old and had never been in court, except for traffic matters, until his involvement with Mother. The legal battle between Mother and Father had required his appearance in court a number of times.

There is no question that these parties were in court frequently. That fact was testified to by several witnesses, and comments were made in reference to prior or other proceedings, including

statements made by the trial court in those earlier proceedings. We do not have the record of those earlier proceedings before us.

Mother's father testified that he had observed Mr. Benjamin making great efforts to cater to Kayla. A longtime family friend, whose granddaughter was Kayla's best friend, testified that Kayla spent time at her house and that she had visited in the Benjamin household. She testified that Kayla never stated she did not like Mr. Benjamin and did not act in a manner consistent with such statements. The witness had observed friendly interactions between Kayla and Mr. Benjamin.

Mr. Benjamin's two adult sons (one a recent college graduate and the other studying at a culinary institute) testified that Mr. Benjamin had been an excellent father to them and had always shown himself to be patient, conscientious, and dedicated to their welfare. They had spent some time in the Benjamin household and described the relationship between Kayla and Mr. Benjamin as good or "fine." One of the sons testified that his father had become quiet around Kayla and that their relationship appeared awkward at times.<sup>12</sup>

An interesting piece of testimony came from Mother's hairdresser, who had often cut Kayla's hair too. On one visit, the hairdresser asked Kayla if she had cut her own hair because it looked crooked. Ms. Costley had cut Kayla's hair. Within the next two days, the hairdresser received a call from Ms. Costley and two calls from Father. They were critical of her remarks, hostile, and even threatening. The hairdresser testified that Father told her they would "shut her up talking about his family."

In her second day of testimony, Kayla stated that her relationship with Mr. Benjamin and her situation at Mother's home had gotten worse since her last court appearance. She felt that both Mother and Mr. Benjamin thought she had lied in her prior testimony in this case as well as in an intervening hearing in another case involving Father and Mr. Benjamin. She felt that Mother and Mr. Benjamin were making "smart remarks" to her and showing their displeasure with her because of her testimony.

Father called Dr. Phillip Blansett, a psychologist and family counselor who treated Brandon and who saw Kayla on a few occasions. He stated that he did not see Kayla as a patient; she had come in from time to time when he was seeing Brandon as a patient. Kayla had asked if she could come in and talk to him on several occasions. He had one session with the entire family. Additionally, at some point Kevin and Amy Costley thought Kayla was depressed and asked Dr. Blansett to observe her to advise whether she needed treatment as well, even though Kayla was already in counseling with someone else. He met with Kayla a total of five times.

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<sup>12</sup>One of the sons intentionally made a statement critical of his father to a friend of Kayla's stepmother, Ms. Costley. As he had anticipated, a couple of weeks later, Kayla asked him about the statement, indicating to the son that Father and his family were telling Kayla bad things about Mr. Benjamin, or at least including her in their determination to see him only in a bad light. Kayla confirmed that her stepmother had told her the things Mr. Benjamin's son had said.

Based on his observations of Kayla, Dr. Blansett was of the opinion that Kayla appeared to be depressed. However, he concluded she suffered from situational depression, not from clinical depression. He said he did not accept her as a patient because he did not think she needed medical intervention. He described the situation causing the stress or depression as her placement, the situation in her mother's home, and the surrounding issues.

In later testimony, he clarified that, from what he described as observational interviews with Kayla, he had concluded there was a problem, but nothing he could be successful in treating. In response to a hypothetical question, he denied that an eleven year old child's feelings about who she wanted to live with could be easily swayed or influenced.

Mother called Dr. Michelle Coop, a child psychologist who had acted as Kayla's therapist for fifteen months, on a weekly or biweekly basis.<sup>13</sup> During her work with Kayla, Dr. Coop had several sessions with Mother and with Mr. Benjamin. Although she had asked Father to come in and talk to her several times, including when she first started sessions with Kayla and as recently as a month before the hearing, he had not done so.<sup>14</sup> Kayla first started seeing Dr. Coop in July of 2002, after the hearing on Father's first modification petition, but before the order denying that petition as to Kayla was entered.

Dr. Coop stated that Kayla had told her about the Nintendo incident and Kayla's belief that Mr. Benjamin injured the dog in retaliation. At that time, Kayla let Dr. Coop know she thought Mr. Benjamin was aggressive in the Nintendo incident. Dr. Coop was concerned that Kayla brought up the incident in connection with discussing what she was going to tell Father's lawyer, not in terms of discussing concerns arising from the incident itself. In following sessions, Kayla never referred to the incident again.

When Dr. Coop observed Kayla in the waiting room with Mr. Benjamin and in sessions with them both, Kayla appeared very comfortable. Kayla did not voice any other concerns about aggression or discomfort with Mr. Benjamin. Dr. Coop stated that the only time the Nintendo incident arose or any discomfort on Kayla's part was when Kayla was concerned about testimony that she either might have to make or had made. Dr. Coop described the relationship between Kayla and Mr. Benjamin, based on what she had seen, as very healthy. She also noted that the quality of the relationship, as described by Kayla, seemed to depend on whether court proceedings were coming up.

Dr. Coop considered Kayla's complaint about the Nintendo dispute insubstantial. She stated that often children in divorce situations make complaints to the other parent, but that it is hoped the parent would look for reasonable explanations rather than suggesting that a squabble over a Nintendo

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<sup>13</sup> Dr. Coop had taken Kayla as a patient after Dr. D'Imperio, who had been seeing her, stopped practicing.

<sup>14</sup> While she was not sure that having Father meet with her at this point would be beneficial, she did believe that it would be beneficial to Kayla for Mother and Father to see a counselor together.

game was something that would be reported as potential abuse and used in court battles. It appeared to Dr. Coop, from Kayla's discussion of the incident, that it was typical of the kind of thing that in other households would have been forgotten in time. She believed that Kayla would have forgotten it had it been handled otherwise.

Dr. Coop did not find it unusual that there were difficulties in incorporating a stepparent into the family. She found it significant that Kayla was never able to make any more specific complaints about Mr. Benjamin. At one point, Kayla told Dr. Coop that initially she was not fond of her stepmother, but that had changed over time, and that she anticipated the same thing might happen with Mr. Benjamin. However, as court proceedings approached, Kayla stopped making such remarks. Kayla also told Dr. Coop she did not like Mr. Benjamin because Brandon did not like him.

Dr. Coop also found it telling that Kayla would not talk about any negative things about Father or her experiences in Father's house. The psychologist stated that healthy children can discuss both positive and negative things about their parents. From looking at Kayla's previous therapist's notes, Dr. Coop gathered that Kayla had been able to do that in the past, *e.g.*, talk about very positive things about her relationship with her father but express concerns about things like his temper. However, with Dr. Coop, all comments about Father were positive. When asked to tell Dr. Coop about things that happened in each parent's house, Kayla edited out any negative comments about Father or his household. Dr. Coop observed that generally children can talk about typical spats or interactions, but Kayla did not.

She gave the example of Kayla's description of the altercation at the ballpark between Father and Mr. Benjamin. Kayla was unable to talk about Father's involvement in that and was unable to see both sides. Dr. Coop saw this lack of ambivalence as an indication of distortion of what Kayla was seeing.

Dr. Coop stated that Kayla is distressed by the continuing legal fight between her parents. She has been upset by the fact she could see no end to it. In this context, Dr. Coop described a phenomenon in which a person aligns herself with the party he or she thinks is going to be the final victor in order to start taking more control of the situation.

Dr. Coop was also concerned about the animosity or alienation Kayla showed to other members of Mother's family, *i.e.*, that Kayla would not in public situations acknowledge Mother's family or friends. When Dr. Coop tried to discuss this conduct with Kayla, Kayla became uncomfortable and wanted to change the subject.

There was some questioning about Kayla's testimony in this and other recent proceedings in terms of its effect on the family relationship. Dr. Coop stated that Kayla was aware that Mother believed Kayla had made misrepresentations in some of her testimony and had not testified truthfully. Additionally, Mother and Mr. Benjamin discussed with Dr. Coop their concerns that Kayla was not telling the truth and how to maintain an honest relationship with her and also abide by the orders not to discuss the case with her.

When Dr. Coop asked Kayla about statements she had made in court, Kayla simply denied making them. She did not discuss any underlying issues or attempt to reconcile her testimony with other statements she had made. She retracted the statements attributed to her. Dr. Coop opined that:

... the prolonged situation that Kayla is in and the contribution, either knowingly or unknowingly, her father and possibly family members have created a very serious psychiatric problem, and that she has incredible difficulties speaking truthfully about custody-related concerns.

When the trial court discussed with Dr. Coop the options the court had in the situation as it existed, Dr. Coop agreed that it was a complicated scenario. "I think the positive solution, of course, would be for father and stepfather to understand what the processes have been that have been undermining Kayla's ability to enjoy both homes and experience both homes as supportive and to assist in doing that." She acknowledged that counseling may or may not be effective in accomplishing that goal, in response to the court's observation that Father would not likely be a willing participant.

When the court asked Dr. Coop about the choice of forcing Kayla to be driven away under protest from the courthouse to Mother's,<sup>15</sup> as opposed to allowing her to live with Father, whether or not Father and his wife had been alienating Kayla from Mother, Dr. Coop responded:

Well, I can tell you that mother has struggled with that same question. And in my opinion, the fact that the Costley family would be willing to separate a child from any kind of positive relationship with the other parent is a very dangerous indicator, and does not suggest that "well, we could finally come to a positive resolution," which I think is part of Kayla's motivation, that all of this will finally stop if I just go live with dad.

But experience with older brother has not been that once they finally live with dad, now they can develop that relationship with both parents. The experience has been all phone calls have cut off, that there's a few phone calls from Brandon's mom, that there's no communication there, whatever. I think that's the most likely outcome for Kayla, as well.

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<sup>15</sup>Our account of testimony at the hearing would be incomplete without our mentioning that a great deal of courtroom discussion involved the question of where Kayla should go (*i.e.*, which parent's house) after each day she testified. After the first day of the hearing, Kayla apparently caused a commotion in the courthouse corridor by screaming and crying at the prospect of returning home with her mother. Mother testified during the next day of testimony, however, that five minutes after getting into the car with her, Kayla calmed down and was perfectly fine. After Kayla's second time on the stand, Father's attorney asked that the child be allowed to go home with Father after testifying. Recognizing that testifying was stressful for her, and not wishing to be responsible for another tantrum, the court acceded to Father's wishes. In some ways, this decision foreshadowed the court's resolution of the case.

And to suggest that that might, in fact, be the most positive result, that's just very troubling. I don't have a clear, positive solution for you, other than the hope that there would be some insight on the parents' part about what's going on. And the – I do take some comfort through my experiences with Kayla when there has never been fighting, screaming scenes with mom, there has never been to me an indication that she has is not happy in her situation with mom and stepdad that dad is reporting.

Dr. Coop testified that she was concerned that Father was actively alienating Kayla from her mother and stepfather, with the possible future result of severing the previously strong bond between mother and child and permanently depriving the girl of her mother's nurturing and support. Because of this, Dr. Coop did not believe it was in Kayla's best interest to change custody.

Much of Dr. Coop's testimony involved a disorder called Parental Alienation Syndrome.<sup>16</sup> She stated that the syndrome arises primarily in the context of child custody disputes and that her observations of Kayla and of other family members showed indications for that syndrome. In a letter to the court, delivered through her testimony, Dr. Coop described the syndrome as follows:

The syndrome refers to the intentional and unintentional programming of children by one parent against the other with the goal of alienating the child from the target parent. This complicated phenomenon, which is triggered by the continued conflict between divorced parents and battle for custody, eventually engulfs a child to the point where they become an active participant in the denigration and rejection of the targeted parent and/or their spouse or extended family members and friends.

Dr. Coop further elaborated by stating that the parent who is denigrated is sometimes a step parent, that the complaints against the disfavored parent are often "weak, frivolous, almost absurd," and that the child's statements about her parents are characterized by lack of ambivalence: that is, most children above a certain age are able to say both positive and negative things about each of their parents, but a child who is a victim of Parental Alienation Syndrome can say only positive things about one parent, and only negative things about the other.<sup>17</sup>

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<sup>16</sup> This syndrome was first described in 1985 by Dr. Richard A. Gardner, a child psychiatrist. Dr. Coop had only recently become aware of it but had researched it because it appeared to her to describe Kayla's situation. Although Dr. Coop does not usually testify in custody matters, she made an exception in this case because of her concerns resulting from her research.

<sup>17</sup> After Dr. Coop testified, Father's attorney called Dr. Blansett as a rebuttal witness. He testified that Parental Alienation Syndrome was not listed in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (D.S.M. IV). This meant that it was not recognized by the profession generally as a diagnosis, even though the theory had been around for a long time. He was aware that a number of scholarly articles had been written about Parental Alienation Syndrome. Dr. Blansett stated that some other conditions that might occur in, or result from, similar situations were recognized diagnoses. For example, a child who has been alienated from a parent he or she loves, especially where the alienation is the result of pressures not consistent with the child's experience with that parent, can experience separation anxiety disorder. That diagnosis is in the D.S.M. Additionally, Dr. Blansett agreed that there were  
(continued...)

She testified that she was not an expert on Parental Alienation Syndrome and was unable to state that Kayla was a victim. Because of her serious concerns, based on her treatment of Kayla for over a year, Dr. Coop recommended that Kayla, her mother, father, stepmother and stepfather participate in a forensic psychological evaluation conducted by a psychologist or psychiatrist with expertise in that field, with the evaluation forwarded to the court. She recommended that no custody change occur until that evaluation was made. Mother's counsel moved the court to accept this recommendation and suspend the hearing pending the results of the evaluation.

The trial court declined to adopt Dr. Coop's recommendation and denied Mother's motion. The court felt it was important to bring the matter to a final resolution rather than delay and thereby prolong the stress Kayla was under.

The trial judge's comments following Dr. Coop's testimony show that he found it persuasive, but not very helpful in terms of the decision he would have to make. Although the court later declined to formally recognize Parental Alienation Syndrome, it stated, "I will say that Parental Alienation Syndrome, it does make total sense to me, total sense, and this is the most extreme of cases, but I'm not sure what you do if you find it . . . ." As discussed below, the trial court was primarily focused on the practical effects, given the situation as it existed, of a change of primary residential parent or, conversely, a failure to order such a change.

## **V. THE COURT'S DECISION**

The judge who presided over the final hearing had also presided over every earlier proceeding in this case, starting with the 1995 divorce hearing. As a result, he had become intimately familiar with the parties and their continuing disputes. At several points during the hearing, the parties and the court made reference to prior findings or statements by the judge. The transcript shows that in the hearing before us, he consistently participated in questioning of the witnesses. At the conclusion of the proof, and after closing arguments by both sides, he discussed the situation at length and the available alternatives, none of which he considered ideal.

Although the final order does not detail the trial court's reasoning, statements made by the court at various stages of the proceedings, including some of the questions the court directed to witnesses, paint a clear picture of that analysis. Essentially, the court primarily focused on the current situation and attempted to resolve the matter in the way that, in view of that situation, had the most practical immediate beneficial effect, in the court's opinion, on Kayla. Some of the statements made by the court in explanation of its decision to modify the existing parenting arrangement to make Father the primary residential parent are:

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<sup>17</sup>(...continued)

situations where one parent would attempt to undermine a child's relationship with the other parent in a post-divorce context or simply not foster that relationship, which could cause such conditions as separation anxiety. He suggested that good counseling with the child and the parents could help in that situation.

Well, it is my belief that Mr. Costley is very controlling and whether consciously or subconsciously, I feel like he is encouraging the children not to be with their mom. But we're then dealt this hand of I kind of am looking at the - at the glass ball into the future. I see that on the one hand if - This is just my perception: If she goes to live with her dad, that it will only be a short time until she will want no contact with her mother, and it will be just like with the son; that's what will happen there. Now, it may not, maybe I always look at the bad cause I see it happen so much.

Or do we do better if I have her go to the mom's. And if I then - I don't think that it would be a case where you'd say there's no visitation and visitation continues on. Well, I don't think there's one of us in this room that would feel like "well, it's now over. Mr. Costley is gonna be happy, he's going to be nurturing about this, he put his best shot forward and he lost and we're going to let bygones be bygones, it's all forgotten." I don't think anyone would say that could happen.

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But we would have a little girl that would grow up really not knowing her mother very much - but growing up, I think, probably graduating from high school, probably being reinforced not to do drugs and things that would get her in trouble and possibly going on to college.

\* \* \*

But I think that if the worst happened, the very worst, I think Kayla will be better with her dad and alienated from her mom than she be with her mom with a festering sore, erupting every time she goes and sees her dad; now, how can that be good for her? It can't be.

The court in essence found both parents fit, capable and loving, at least where the child's relationship to the other parent is not involved. It observed that Mother was an expressive and caring person. The court also made references to Father's controlling nature and his focus on every detail of the children's lives. The court also predicted that counseling would not be effective because Father would likely be an unwilling participant. Thus, the court found there was little reason to believe Father would change in his approach or could be persuaded to change.

The trial court stated several times that Father had proven himself unwilling to encourage a close relationship between Kayla and Mother and that Father had, consciously or unconsciously, attempted to weaken the bond between Kayla and Mother. The court predicted that the change of custody he ordered would result in the relationship between Mother and daughter deteriorating and eventually being severed.

The trial court also found there was a material change of circumstances, which the final order describes as “the change in the family relationship and dynamics between the parties, step-parents and the minor child.”

## VI. ANALYSIS

It is clear that the trial court struggled with this decision. We understand the difficulty the case presented since we now face the same difficult situation. Nonetheless, it is clear that the trial court’s decision was based on its conclusion that Kayla’s best interest lay in ending the legal battles over her residential placement. It is also clear that the court determined that the only way to end that conflict was to make Father the primary residential parent, regardless of the relative responsibility attributable to each parent for the continuation of the legal battles and any resulting harm to Kayla and irrespective of the court’s power to control or limit effective continued recourse to the judicial system. We will review the trial court’s decision using the two-step analysis mandated by *Cranston* and its predecessors.

As set out earlier, the first question is whether a material change of circumstances occurred after entry of the prior order that affected Kayla’s well-being in a meaningful way. We note that the court did not identify any specific occurrence as that change. Consequently, the court did not rely on the specific incidents that were the subject of much testimony but that occurred prior to the last parenting arrangement order.

An analysis of Father’s petition for modification shows that it was based on Kayla’s relationship with Mr. Benjamin, which was characterized as “not good,” and on Kayla’s expressed (impliedly to Father) desire to live primarily with Father. Those statements were obviously made prior to the filing of the modification petition and, consequently, prior to the entry of the existing order.

Regardless of the timing of any change in Kayla’s wishes as to her primary residential placement, a change in her preferences does not alone constitute a material change in circumstances. While courts are authorized to consider the “reasonable preferences” of a child, such consideration is applicable to the best interest phase of a modification decision. Tennessee Code Annotated § 36-6-106(a)(7) lists as a factor to consider in making a custody determination in the best interest of the child:

The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children.

The same factor is relevant to a court’s establishment of a residential schedule for a child in a permanent parenting plan. Tenn. Code Ann. § 36-6-404(b)(14). As of the hearing below, Kayla was not yet twelve years old. Thus, the court was authorized to hear Kayla’s preferences on the issue of best interest, but was not required to hear them even on that issue. The statute’s differentiation

based on the age of the child reflects a legislative judgment that the preferences of younger children are less reliable as guides to their best interest. Whether or not a court chooses to hear from a younger child, or even to consider a child's preferences as a factor in the design of a parenting arrangement, there is nothing in the applicable statutes indicating changing preferences could constitute a material change of circumstances.

A young child's changing wishes about where he or she wants to live do not, by statute or otherwise, create a material change of circumstances. Children can easily decide they would rather live with the more lenient or generous parent rather than the one who just refused to buy the newest must-have item or who set rules the child did not agree with. Neither the legislature nor the courts want to encourage parents to seek modification of custody on the sole basis of a child's shifting preferences in the absence of a real change of circumstances that affects the wellbeing of the child. Consequently, we find Kayla's desire to live primarily with Father is not sufficient in and of itself to establish a change of circumstance.

The trial court found there had been a change in the family relationships and dynamics. The court did not identify that change nor when it took place. The proof does not establish an incident or occurrence happening after the prior order that changed the dynamics. Other comments by the trial court suggest that it saw the same patterns of conduct on the part of the Mother and Father as it had seen throughout this litigation, noting in particular Father's demonstrated resolve to obtain primary custody of Kayla. In fact, the only new circumstance occurring before the hearing herein that had an effect on the families' relationships and interactions was Father's new petition for modification of the parenting arrangement and the effect it had on Kayla and others.

We can only presume that the trial court found a gradual decline in Kayla's satisfaction or comfort in Mother's home. There was testimony from Kayla about an increase in tension or additional strain on the relationships in Mother's household between Kayla's first appearance in court in these proceedings and her second. Kayla was discomfited by what she perceived as reactions by Mother and Mr. Benjamin to her testimony. As Dr. Coop pointed out, Mother and Mr. Benjamin had sought help in dealing with the situation within the confines of the court's instructions. Dr. Coop also opined that Kayla was having difficulty in identifying the truth in this custody battle; in fact, Kayla denied making the statements that Mother and Mr. Benjamin believed were not accurate.

We conclude that the evidence preponderates against the trial court's finding that a material change of circumstances had occurred. Father, as the party seeking modification of an existing order, had the burden of proving a change since entry of that order that affected Kayla's wellbeing in a meaningful way. Our review of the record leads us to conclude he failed in meeting that burden. We simply do not find a material change in circumstance since the last order. While Kayla may have been less comfortable at Mother's house as the legal proceedings, instituted by Father, continued, and while she may have come to believe she would rather live primarily at Father's house, encouraged or influenced in this desire by Father, there is no evidence of any event or change in circumstances as that term has been defined by the courts.

Where the primary residential parent is shown to be a loving, nurturing, and responsible parent, a material change of circumstances is not shown by proof of the development of a closer relationship with the other parent, improvement in the home of the other parent, or an incident of poor judgment by the primary residential parent. *Kendrick*, 90 S.W.3d at 572-74; *Blair*, 77 S.W.3d at 150-51.

Finally, we note that the legislature has provided additional guidance on the meaning of material change of circumstances such as to support a modification of parenting arrangements. In a request to modify either a prior custody order or a prior parenting plan residential schedule, a material change of circumstances may include “circumstances which make the parenting plan no longer in the best interest of the child” or “circumstances making a change in the residential parenting time in the best interest of the child.” Tenn. Code Ann. § 36-6-101(a)(1)(B) and (C).<sup>18</sup> We do not interpret this language, however, as eliminating the requirement, also established by statute, that some change of circumstance occur and that it be a change that affects the wellbeing of the child.

As discussed earlier, both the legislature and the courts have recognized the importance of continuity and stability to the welfare of children, including in particular stability in their residential placement and schedules. Tenn. Code Ann. § 36-6-101402(a) (“The general assembly finds the need for stability and consistency in children’s lives.”); *Blair*, 77 S.W.3d at 148 (recognizing the importance of the child’s interest in a stable and secure environment). The requirement that a material change of circumstances has occurred protects that important interest.

In the case before us, the only instability and resulting stress to Kayla appears to have resulted from Father’s continuing efforts to obtain primary residential placement of Kayla through legal proceedings. These efforts created uncertainty in Kayla about her future residential placement and were the principal cause of the stress and emotional trauma she suffered.

Nonetheless, even if a material change of circumstance occurred, a modification of the parenting arrangement was justified only if such modification were shown to be in Kayla’s best interest. The legislature has provided a list of factors to consider in making that determination. Tenn. Code Ann. §§ 36-6-106(a) and 36-6-404(b). Important to the case before us, when fashioning a residential schedule for a child, courts are to consider:

The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child.

Tenn. Code Ann. § 36-6-404(b)(3). *See also* Tenn. Code Ann. § 36-6-106(a)(10).

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<sup>18</sup>The second of those provisions, Tenn. Code Ann. § 36-6-101(a)(1)(C), appears to merge the two steps of the *Cranston* analysis.

This factor is consistent with the policy espoused by the legislature in the statutes regarding custody and visitation or parenting arrangements.

The general assembly recognizes the detrimental effect of divorce on many children and that divorce, by its nature, means that neither parent will have the same access to the child as would have been possible had they been able to maintain an intact family. . . . The general assembly recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests.

Tenn. Code Ann. § 36-6-402(a).

Further, the legislature has found that “Most children do best when they receive the emotional and financial support of both parents.” Tenn. Code Ann. § 36-6-402(b). Courts are directed to make residential provisions for a child that “encourage each parent to maintain a loving, stable, and nurturing relationship with the child.” Tenn. Code Ann. § 36-6-404(b).

In a number of cases, where both parents have been found individually fit, this court has approved reliance on a parent's willingness, or lack thereof, to encourage the child's close relationship with the other parent. Our Supreme Court has also acknowledged the importance of that factor. In *Cranston*, the Court found that the mother's pattern of interference with the father's relationship with their children was a material change of circumstances that posed a substantial risk of harm to the children. 106 S.W.3d at 645. The Court also affirmed the trial court's finding that, although both parents were fit, the best interests of the children were served by changing primary custody to the father so that the children would be allowed to have a relationship with their father. 106 S.W.3d at 646.

In the case before us, the trial court, who was very familiar with the families and their history, clearly felt that Father had engaged in conduct that created much of Kayla's unhappiness and distress and was unlikely to cease that pattern of conduct. The court also stated that Father had, intentionally or unintentionally, tried to lessen the close relationship between Kayla and Mother. Further, the court considered it likely that Kayla would eventually lose her relationship with Mother and the nurturing and support that relationship would provide. The court foresaw that Father would be responsible for that loss. The record provides a number of examples of the kind of conduct by Father and his family aimed at, or likely to result in, alienating Kayla from Mother, including manipulating her emotions.

Despite these findings that Father was unwilling or unable to encourage a close relationship between Kayla and Mother and, in fact, discouraged such a relationship, the trial court nonetheless found that changing Kayla's primary residential placement to Father was in her best interest. We are unable to reconcile this conclusion with the court's other findings or with the factors relevant to a best interest analysis. The trial court clearly saw that Kayla was distressed and tried to alleviate

that distress by giving Father what he sought so that he would stop the legal battles. Like Kayla, the court seemed to think that was the only way the struggle that caused Kayla such pain would end. While we are sympathetic to the court's good intent, we cannot find any basis for disregarding the cause of the problems, as the trial court clearly did.<sup>19</sup> Our review of the record, the trial court's statements and rulings, and the relevant factors leads to the conclusion that the evidence preponderates against the trial court's finding regarding Kayla's best interest.

In this regard, it is significant to note that the legislature has directed that a permanent parenting plan should minimize the child's exposure to harmful parental conflict.<sup>20</sup> Tenn. Code Ann. § 36-6-404(a)(3). Because a parent's conduct may have an adverse effect on the child's best interest, courts are authorized to place limitations in a parenting plan if any of a list of factors is found to exist. Tenn. Code Ann. § 36-6-406 (d). Among those listed factors is "The abusive use of conflict by the parent which creates the danger of damage to the child's psychological development." Tenn. Code Ann. § 36-6-406 (d)(5).

We place significance on the testimony of Dr. Coop since she was the only mental health professional who testified who had personal knowledge of Kayla through weekly and biweekly sessions for over a year. That testimony clearly presents a picture of a child with emotional and/or psychological problems attributable by Dr. Coop to the continuing custody struggle and Kayla's role in it. Father's conduct, whether by design or otherwise, contributed to these problems.<sup>21</sup>

Divorce affects children profoundly by undermining their sense of stability and well-being. *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996). Creating a situation where a child feels forced to choose sides only worsens the effects. Thus, divorcing parents who are truly concerned for the well-being of their children should do everything within their power to mitigate the harsh effects of divorce, including encouraging their children to maintain a close and supportive relationship with both parents. *Turner v. Turner*, 919 S.W.2d 340, 346 (Tenn. Ct. App. 1995).

It is obvious that it would be in Kayla's best interest to maintain a close relationship with both families, each with its own strengths and weaknesses, and each of which would add to her development. That is the clear public policy of this state. When it is shown that one parent is incapable of furthering that interest and policy, it is not in the child's interest for that parent to have primary residential placement.

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<sup>19</sup> It is telling that Father's petition for modification relied on Kayla's preference and that Father placed the burden of his case on Kayla, who testified twice in this hearing alone. Not only was this young child forced to choose sides, she was forced to undergo the trauma of testifying knowing one parent or the other would be disappointed.

<sup>20</sup> Additionally, Tenn. Code Ann. § 36-6-101(a)(3)(F) gives each parent the right to be free of unwarranted derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child.

<sup>21</sup> We need not determine whether Parental Alienation Syndrome is recognized by the psychological community or establishes a reliable basis for expert testimony. Dr. Coop did not testify that Kayla was a victim of that syndrome and specifically stated she was not expert enough in the area to make that diagnosis. Dr. Coop did testify, however, specifically about Kayla and her opinion regarding Kayla.

For these reasons, we reverse the trial court's judgment modifying the existing parenting plan and awarding primary residential placement to Father.

## **VII. CONCLUSION**

We are aware that Kayla has been living primarily with Father since the trial court's order modifying the parenting arrangement. This court has no way of knowing what the current situation is with these parties and their children. However, we are also aware of the importance of stability and continuity to a child. Consequently, although our reversal of the trial court's judgment modifying the prior parenting arrangement results in the reinstatement of the judgment of August 23, 2002, we remand this matter for the trial court to fashion a transition plan that will lessen any immediate negative effect on Kayla of the change in her primary residence to Mother. Any such plan should be designed to restore Mother as the primary residential parent as expeditiously as possible with due regard for Kayla's needs. The court may order the participation of counselors and both parents, as it deems fit.

The judgment of the trial court is reversed. We remand this case to the General Sessions Court of Wilson County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellee, Kevin Joseph Costley.

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PATRICIA J. COTTRELL, JUDGE